Supreme Court, U.S.
FILED

AUG 10 2010

OFFICE OF THE CLERK

No. 10-____ 10-210

IN THE

# Supreme Court of the United States

YVONNE R. KOVACEVICH and
ROBERT E. KOVACEVICH,
*Petitioners*,

v.

UNITED STATES,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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August 11, 2010

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## QUESTIONS PRESENTED

1. Are Petitioners taxpayers allowed to seek an interim appeal of a Court of Federal Claims decision allowing a counterclaim to enforce a Tax Court Judgment against non-taxpayers?

2. Did the Federal Circuit err in refusing to hear jurisdiction of the Court of Federal Claims thereby totally ignoring this Court's recent decisions of *Ashcroft v. Iqbal*, 566 U.S.___, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Hinck v. United States*, 550 U.S. 501, 127 S.Ct. 2011, 167 L.Ed.2d 888 (2007).

## PARTIES TO THE PROCEEDING

In the proceeding in the United States Court of Federal Claims, No. 08-116 T, Western Management Inc., whose name was recently changed to credeX Inc., Yvonne R. Kovacevich and Robert E. Kovacevich were joint Plaintiffs. The United States was Defendant and Counterclaimant. The Appeal to the United States Court of Appeals to the Federal Circuit No. 2010-5011 was taken only by Yvonne R. Kovacevich and Robert E. Kovacevich, Plaintiffs-Appellants.

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IN THE

# Supreme Court of the United States

No. 10-____

YVONNE R. KOVACEVICH and
ROBERT E. KOVACEVICH,
*Petitioners*,

v.

UNITED STATES,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the Court of Appeals of the Federal Circuit issued December 16, 2009 is unreported. It is reprinted at Petitioners Appendix A, 1a-3a to the Petition. The Motion for Reconsideration App. B, 4a-5a was decided May 19, 2010. This Petition is timely. Both opinions were labeled non precedential. The United States Court of Claims Opinion was issued March 20, 2009. It is reprinted as Pet. App. C, 5a.

## JURISDICTION

The Court of Appeals entered its final decision on May 19, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

28 U.S.C. § 1291 vesting the United States Court of Appeal for the Federal Circuit with appellate jurisdiction under 28 U.S.C. 1292 (c), (d) and 1295. 28 U.S.C. § 1295(a)(3) allowing appeals from interlocutory decisions of the United States Court of Federal Claims. 28 U.S.C. § 1503 regarding Court of Federal Claims jurisdiction of set offs. 26 U.S.C. § 6330(a)(1); (b) and (d)(1), providing that the IRS must give 30 days notice of levy on property "of any person", giving a right to a fair hearing before an impartial officer of the IRS and also granting appeal exclusively to the United States Tax Court. Also involved is 26 U.S.C. 6404(g) abating interest if an assessment is not made within 18 or 36 months from the filing of tax returns. Assessment of withholding, 26 U.S.C. § 6672(a) is also involved as the IRS assessed the 6672 penalty against Robert E. Kovacevich for taxes that had already been paid twice before. 26 U.S.C. 6304(b) prohibits general harassment or harassing collection practices by the IRS over collection without crediting the social security taxes occurs. 26 U.S.C. § 7426(a)(1) and (b) apply as exclusive jurisdiction is granted to the District Court to enjoin and restrain collection actions by the United States for taxes attempted to be collected from third parties applies.

## STATEMENT OF THE CASE

### A. Proceedings Below

On February 28, 2010 (Appendix D, 5a-23a), the three trial court Plaintiffs, Western Management Inc., a corporation once wholly owned by Yvonne R. Kovacevich and Robert E. Kovacevich, commenced an action against the United States for over collection of the withholding, social security tax and interest of Robert E. Kovacevich at least twice and sometimes three times for the same quarters. 18 years of interest is also at issue in the case. The action by the United States amounted to frivolous conduct within the case of *Jones v. United States,* 613 F.2d 1311 (5th Cir. 1980). The complaint seeks tax refunds, 26 U.S.C. § 6672, 26 U.S.C. 3402(d) and 26 U.S.C. 7433. 42 U.S.C. 1983 damages were also requested. Western Management Inc., paid all the employment taxes on employees classified by them. This case involves only the then owner worker who paid his employment taxes in his 1040 return as self employed.

I. The United States filed an Amended Answer and Counterclaim on April 3, 2009 (Appendix E, 24a-48a). It was totally separable from Plaintiff's complaint as the Amended counterclaim was a judgment entered by the United States Tax Court only against Western Management Inc. Petitioners were not parties in the Tax Court. Petitioners moved to strike the Amended Counterclaim on April 1, 2009, (Appendix F). The Trial Court denied the motion on September 25, 2009. Petitioners timely appealed to the United States Court of Appeals for the Federal Circuit for collateral relief as the Court of Claims has no jurisdiction to bring a third party action to collect a tax court judgment when the suit was against a

third party. The motion for reconsideration asked reconsideration of the Federal Circuit's refusal to grant collateral relief to Petitioners. *Ashcroft v. Iqbal,* 556 U.S. ___ 129 S.Ct. 1937, 1953, 173 L.Ed.2d 868 (2009) clearly establishes grounds for granting the Petition. The United States counterclaim does not in any way relate to the Plaintiffs complaint in this case. Lack of jurisdiction alone makes the counterclaim severable. *Hinck v. United States,* 550 U.S. 501, 509, 127 S.Ct. 2011, 167 L.Ed.2d 888 (2007) is binding precedent and exactly in point. It holds that the U.S. Tax Court has exclusive jurisdiction of tax collection remedies, not the Court of Federal Claims. *Hinck* holds that 26 U.S.C. 6404, the same statute abating interest that is at issue in this case, added in 1996 and amended in 1998, deprived the Court of Federal Claims of jurisdiction to determine interest abatement on tax deficiencies. The case holds that the United States Tax Court has exclusive jurisdiction of issues regarding interest on tax deficiencies. The *Hinck* opinion states, 550 U.S. at 509:

> We find nothing tellingly awkward about channeling such discrete and specialized questions of administrative operations to one particular court, even if in some respects it "may not appear to be efficient" as a policy matter to separate refund and interest abatement claims.

The Court of Federal Claims failed to follow this Court's three year old *Hinck* case and found Court of Federal Claims jurisdiction of a counterclaim for a case that is exclusively within the United States Tax Court or United States District Court jurisdiction. The United States Court of Appeals for the Federal Circuit refused to allow an interim appeal based on lack of jurisdiction. This requires excessive costs to

defend, thereby ignoring this Courts one year old decision of *Iqbal*. Both Federal Courts refused to follow binding authority. "Obviously, binding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must"; *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

## REASON FOR GRANTING THE PETITION

### A. The Counter Claim is Severable.

The Federal Circuit failed to follow *Ashcroft* and *Hinck* mandating an interim appeal when the issued law is severable when there is no jurisdiction and the moving party is saddled with unreasonable expense against a government that has no expense constraints.

It is respectfully suggested that this Court summarily send the case back to the United States Court of Appeal for the Federal Circuit for decision on the merits. This request is also based on the legal authority hereafter reviewed and the fact that this Court is also reviewing the Court of Federal Claims jurisdiction in *United States v. Tohono O'odham Nation*, 130 S.Ct. 2097, 176 L.Ed.2d 721 Lower Court Decision 559 F.3d 1284 (Fed. Cir. 2009).

The United States cannot use its setoff statute, 28 U.S.C. § 1503, an imprecise 1948 law to revive suits that are *res judicata* and within the exclusive jurisdictions of other courts and barred by the statutes of limitation. *Ready Mix Concrete Co., v. U.S.*, 131 Ct.Cl. 204, 130 F.Supp. 390 (Ct.Cl. 1955) prohibits wage suits where the statute of limitation have

barred the suit. *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 92 L.Ed 898 (1948) prevents repetitious tax litigation under the general rule of *res judicata*. 26 U.S.C. § 6330(d)(1) requires a notice and hearing of tax collection against any party 26 U.S.C. 6330 (d)(1) grants exclusive jurisdiction for Tax Court review of failure to furnish due process in tax collection. 28 U.S.C. § 7426(a)(1) grants exclusive jurisdiction in the United States District Court to restrain tax collection against non-taxpayer third parties. Interest abatement is the exclusive remedy in the United States Tax Court. 26 U.S.C. 6404(g). This lack of jurisdiction has so far departed from the statutes conferring jurisdiction on the United States Court of Federal Claims that this Court's supervisory power must be exercised. In failing to allow the interlocutory appeal, the United States Court of Appeals for the Federal Circuit, failed to follow this Court's decision. *Ashcroft v. Iqbal*, 129 S.Ct., at 1953, holds that heavy costs of time and resources of proceeding to trial, especially when no jurisdiction exists for a counterclaim, requires the courts of appeal to entertain jurisdiction. The claim in this case was completely severable from the complaint, is too important to deny review as the cost to a individual will deny due process when the United States is the claimant. Further, the counterclaim is too independent to be deferred when the case is adjudicated.

*Ashcroft*, 129 S.Ct. at 1945 specifically includes a denial of a motion to dismiss within the exception of cases that are immediately appealable stating:

> The orders within this narrow category are immediately appealable because they 'finally determine claims of right separable from, and

collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Ibid.* (Quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct 1221, 93 L.Ed. 1528 (1949)).

A district-court decision denying a Government officer's claim of qualified immunity can fall within the narrow class of appealable orders despite "the absence of a final judgment." *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct 2806, 86 L.Ed.2d 411 (1985). This is so because qualified immunity which shields Government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights," *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct 2727, 73 L.Ed.2d 396 (1982) is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation." *Mitchell, supra,* 472 U.S. 526, 105 S.Ct 2806. Provided it "turns on an issue of law," *id.*, at 530, 105 S.Ct 2806, a district court order denying qualified immunity "conclusively determines" that the defendant must bear the burdens of discovery; is "conceptually distinct from the merits of the plaintiff's claim"; and would prove "effectively unreviewable on appeal from a final judgment."

*Id.*, at 527-528 (citing *Cohen, supra* at 546, 69 S.Ct 1221).

**B. The Trial Court had no Jurisdiction to Allow the Counterclaim.**

All of the *Iqbal* factors are fulfilled hereby allowing this Petition to be granted. The United States seeks to tack on a Tax Court judgment that has no jurisdiction, is unrelated, *res judicata* and beyond the statute of limitation. It is also totally unrelated to all facts of the complaint. The decision turns solely on an issue of law. *Warney v. Monroe County*, 587 F.3d 113, 120 (2nd Cir. 2009), follows *Iqbal* where, as here, only an issue of law needs interlocutory review. Further, it is completely severable and independent, therefore it should be reviewed by the Appellate Court.

David B. Savage, *Narrowing the Courthouse Door* A.B.A.J., July 2009 pp. 22-23, commenting on *Iqbal*, states:

> But lawyers say *Iqbal* will prove even more important in ordinary civil litigation. They say the decision raises the hurdle to get past the pleading stage, strengthening the specificity needed to get into court. No one seems to doubt the court wants to make it harder for plaintiffs to get inside the door. . . .
>
> It is the second time in three years that the court dismissed a major lawsuit at the pleading stage. The court first sounded this new note of skepticism in 2007's *Bell Atlantic v. Twombly*. In a 7-2 decision, the justices tossed out a huge antitrust suit that alleged the former "Baby Bells" had conspired not to compete against each other.
>
> In the *Twombly* majority opinion, Justice David H. Souter wrote that the plaintiffs had claimed there was a possible conspiracy, but put forth no facts to make the claim plausible. Souter added

> that it was possible to believe the regional telephone companies chose on their own to continue operating within their established territories. He also said that because discovery is so expensive and time-consuming, judges should not clear suits to go forward without some facts pointing to a conspiracy.

The *Twombly* reference is to *Bell Atlantic Corp., v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

The Ninth Circuit followed *Iqbal* in *Mueller v. Auker,* 576 F.3d 979, 987 (9th Cir. 2009) stating:

> The three attributes of such an immediately appealable "final order" are (1) they 'finally determine claims of right [such as qualified immunity] separable from, and collateral to, rights asserted in the action'"; (2) are "'too important to be denied review'"; and (3) are "'too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Ashcroft v. Iqbal,* 556 U.S. __, 129 S.Ct.1937, 173 L.Ed.2d 868 (2009) (quoting *Behrens v. Pelletier,* 516 U.S. 299, 305, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996); quoting in turn *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)).

The appeal in this case is purely one of law as the question is whether the Court of Federal Claims has jurisdiction of a federal tax counterclaim involving a tax court judgment and federal tax interest abatement. As previously stated, *Hinck v. United States,* 550 U.S. 501, 509, 127 S.Ct 2011, 167 L.Ed.2d 888 (2007)

holds that the Court of Federal Claims has no jurisdiction.

In its decision in this case, the United States Court of Appeals for the Federal Circuit relied on *Ultra Precision Mfg. LTD v. Ford Motor Co.,* 338 F.3d. 1353, 356-57 (Fed. Cir. 2003). This case cannot apply as the counterclaim is totally unrelated to the refund claim of Petitioners. The counterclaim sought is to attach a Tax Court judgment that has already been litigated. *Iqbal,* 129 S.Ct at 1945 decided after *Ultra Precision*, *supra*, states that if the claim is a legal issue and severable, it is appealable.

> The orders within this narrow category "are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Ibid,* (quoting *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

*Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S. Ct. 2454, 57 L.Ed.2d 351 (1977) cited by the government precedes *Iqbal* by 22 years and would still not be appealable as it involved "enmeshed factual and legal issues." *Firestone Tire and Rubber Co., v. Risjord,* 449 U.S. 368, 374, 101 S. Ct. 669, 66 L.Ed.2d 571 (1980) is distinguishable as it presented a non severable factual question of judicial disqualification of counsel. *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed 911 (1945) obviously pre *Iqbal,* involved a factual, not legal issue. *Cabot Corp., v. U.S.,* 788 F.2d 1539, 1542-3 (Fed. Cir. 1986) involved a non severable order and relied on *Cohen v.*

*Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 2757, 93 L.Ed 1528 (1937). *Ashcroft* 129 S.Ct., at 1946, expanded *Cohen* stating: "As a general matter, the collateral-order doctrine may have expanded beyond the limits dictated by its internal logic and the strict application of the criteria set out in *Cohen*.". *Cabot,* 788 F.2d at 1544 also required that the issue be "effectively unreviewable". This standard no longer applies.

**C. The Cost is Unnecessary.**

The reason for the heightened pleading scrutiny is presented in this case. The Court in *Iqbal* 129 S.Ct at 1953 was concerned with the heavy costs of time and resources in proceeding to trial. Here a tiny corporation, an insignificant taxpayer, will have to withstand the expenditure of unlimited funds the government has to pursue discovery trial and appeal. Justice Douglas, in his concurring opinion in *Commissioner of Internal Revenue v. Lester,* 366 U.S. 299, 307, 81 S.Ct 1343, 6 L.Ed.2d 306 (1961), states the same reason, that the cost and time factor should be considered in tax cases. He states: "Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer". This is the reason this case is within the final decision exception. All the exceptions are present here for the reasons that the Court of Appeals is a final decision on subject matter jurisdiction, the decision is too important to be denied even as the cost of tax litigation against the government cannot be borne by any third party. Further, the Tax Court judgment is independent of the damages complaint of the Petitioners who were not joined as parties in the Tax Court. The United States histori-

cally has litigated taxpayers with superior numbers and ability to finance its debt worldwide, an opportunity no taxpayer can duplicate.

This case and the amount involved is probably one of the least significant of Petitioners. However, the United States Supreme Court has a duty to supervise and overturn all inferior court decision that disregard this Court's current opinions. This is such a case.

## CONCLUSION

*Iqbal* and *Twombly* were intended to allow resolutions to severable and legal issues of jurisdiction to avoid cost of litigation. They are exactly in point here. The Petition should be granted.

Respectfully submitted,

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August 11, 2010

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# APPENDIX A

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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2009-5068

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WESTERN MANAGEMENT, INC.,
*Plaintiff*,

and

YVONNE R. KOVACEVICH
*Plaintiff-Appellant*,

and

ROBERT E. KOVACEVICH,
*Plaintiff-Appellant*,

v.

UNITED STATES,
*Defendant-Appellee*.

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Appeal from the United States
Court of Federal Claims in 08-CV-116,
Judge Nancy B. Firestone.

---

ON MOTION

Before MICHEL, *Chief Judge*, LOURIE and BRYSON, *Circuit Judges*.

PER CURIAM.

ORDER

The United States moves to dismiss Yvonne R. Kovacevich and Robert E. Kovacevich's appeal as premature. The appellants oppose.

The appellants filed a complaint in the United States Court of Federal Claims seeking a refund of federal income taxes paid. The United States counterclaimed for outstanding tax liabilities. The appellants moved to strike the counterclaim for lack of jurisdiction and the Court of Federal Claims denied the motion in part. The appellants appealed that order.

The court's jurisdiction over appeals from decisions of the Court of Federal Claims is governed by 28 U.S.C. § 1295(a)(3). Section 1295(a)(3) provides that the court has jurisdiction over "an appeal from a final decision of the United States Court of Federal Claims" (emphasis added). "A '*final* decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945); *see also Ultra-Precision Mfg. Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1356-57 (Fed. Cir. 2003) (la] district court's judgment is final where it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" (citation omitted)). Because the complaint and the United States' counterclaim are pending in the Court of Federal Claims, there is no final decision or judgment.

Accordingly,

IT IS ORDERED THAT:

(1) The United States' motion to dismiss is granted.

(2) Each side shall bear its own costs.

FOR THE COURT

JUL 02 2009
Date

/s/ Jan Horbaly
Jan Horbaly
Clerk

[Filed]
U.S. Court of Appeals
for the Federal Circuit

JUL 02 2009

JAN HORBALY
CLERK

cc: Robert E. Kovacevich
Yvonne R. Kovacevich
Regina S. Moriarty, Esq.

s20

ISSUED AS A MANDATE: JUL 02 2009

## APPENDIX B

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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2009-5068

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WESTERN MANAGEMENT, INC.,

*Plaintiff*,

and

YVONNE R. KOVACEVICH

*Plaintiff-Appellant*,

and

ROBERT E. KOVACEVICH,

*Plaintiff-Appellant*,

v.

UNITED STATES,

*Defendant-Appellee*.

---

Appeal from the United States
Court of Federal Claims in 08-CV-116,
Judge Nancy B. Firestone.

---

ON MOTION

Before MICHEL, *Chief Judge*, LOURIE and BRYSON, *Circuit Judges*.

PER CURIAM.

ORDER

The appellants move for reconsideration of the court's order dismissing their appeal as premature.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

MAY 19 2010
Date

/s/ Jan Horbaly
Jan Horbaly
Clerk

cc: Robert E. Kovacevich
Yvonne R. Kovacevich
Regina S. Moriarty, Esq.

s20

[Filed
U.S. Court of Appeals
for the Federal Circuit
MAY 19 2010
JAN HORBALY
CLERK

## APPENDIX C

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

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No. 08-116T
(Filed: October 7, 2009)

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WESTERN MANAGEMENT, INC., YVONNE KOVACEVICH and ROBERT KOVACEVICH,
*Plaintiffs*,

v.

THE UNITED STATES
*Defendant*.

---

ORDER

The court is in receipt of the plaintiffs' motion, dated October 5, 2009, for reconsideration of its September 25, 2009 order denying the plaintiffs' motion to strike the defendant's amended counterclaim. The motion is DENIED.

The plaintiffs are directed to file their answer to the amended counterclaim by October 27, 2009. *See* Rule 12(a)(1)(B) of the Rules of the Court of Federal Claims.

IT IS SO ORDERED.

/s/ NANCY B. FIRESTONE
NANCY B. FIRESTONE
Judge

## APPENDIX D

UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed FEB 28 2008]

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08-116 T

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WESTERN MANAGEMENT, INC.,
YVONNE R. KOVACEVICH and ROBERT E. KOVACEVICH
WIFE and HUSBAND,
*Plaintiffs*,

v.

UNITED STATES OF AMERICA,
*Defendant*.

---

### COMPLAINT FOR INCOME, EMPLOYMENT TAX REFUNDS, EQUITABLE RECOUPMENT AND DAMAGES FOR WRONGFUL COLLECTION.

A. Introduction

This is an income and employment tax refund and damage suit against the Internal Revenue Service. Plaintiffs are Western Management Inc., a Washington State corporation, and two married *pro se* individuals, Yvonne R. Kovacevich and Robert E. Kovacevich, wife and husband. Plaintiffs seek recovery of withholding taxes, withholding tax penalty assessments, Federal Insurance Contributions Act ("FICA") taxes, hospital insurance taxes (Medicare), penalties, interest and damages for taxes erroneously, arbitrarily and illegally assessed against the Plaintiffs by the Internal Revenue Service. An RCFC 7.1(a) statement is attached to this Complaint.

B. Overview

Western Management Inc., owned by the individual Plaintiffs from 1988 through 1995, had two or three persons it classified as employees. It correctly withheld and timely filed forms 941 and 940, paid over all employment taxes due from withholding of persons it classified as employees. The Internal Revenue Service audited Western Management Inc, and the individual Plaintiffs at the same time. The Internal Revenue Service reclassified owner Robert E. Kovacevich as an employee of Western Management Inc. Throughout all audits involved, only the worker status of it's owner, Robert E. Kovacevich, was at issue. The Internal Revenue never attempted to question the worker status of any other person who worked for Western Management Inc. The Internal Revenue Service assessed Western Management Inc., for withholding on Robert E. Kovacevich even though the Internal Revenue Service knew, through its audit agent, that the individual Plaintiffs had paid all the income tax, social security and medicare tax on the same income from the business as a self employed individual. With full knowledge of the personal payment of all taxes by the Plaintiff individuals the Internal Revenue Service assessed the corporation for employment taxes that were paid by the individual Plaintiffs at least 3 years before the audits began.

While the issue was on appeal, the Internal Revenue Service assessed Robert E. Kovacevich the 26 U.S.C. 6672 100% penalty as a responsible officer on taxes he had already paid on his 1040 returns. The Western Management Inc., appeal of this issue was that all withholding of income tax was cancelled. The ridiculous conundrum is that the IRS assessed the

Plaintiff Robert E. Kovacevich as a responsible officer for tax that Western Management Inc., was alleged to be liable prior to the time the Western Management Inc., case was final. The final result was that Western Management was not liable for the tax. Kovacevich would have been credited the 100% penalty tax at his individual level but in fact he already paid it yearly with his individual tax returns.

The Internal Revenue Service also knew that he had paid maximum social security for the years involved but it assessed the same social security taxes against Western Management Inc., that were already paid by Kovacevich as an individual with his 1040 returns. The obvious result was the Internal Revenue Service assessed Plaintiffs twice for taxes already paid. By the 100% penalty, it sought to be paid three times. The Tax Court abrogated the withholding requirements of Western Management Inc., in 2007 The Internal Revenue Service also cancelled all 100% penalties for quarters commencing in 3/1994 through 3/1995 on February 12, 2008. *Western Management Inc., v. Commissioner of Internal Revenue*, United States Tax Court Docket No 12686-99 Despite demands by Plaintiffs from 1999 on, the Internal Revenue Service has never credited or transmitted records of social security taxes assessed and partially collected against Western Management Inc., for the years 1988 through 1995 to Kovacevich's social security earnings record with the Social Security Administration.

The theory of withheld taxes is to aid the worker to "pay as you go" The recipient of the income always has the ultimate burden to pay his or her tax. 26 U.S.C. 3101. The employer is required to withhold taxes from the employee's wages, 26 U.S.C. 3111, but

does not have to withhold if the recipient of the income has paid the tax. 26 U.S.C. 3402(d); 3406(h)(10) All withheld taxes including excess withholding must always be credited to the worker. 26 U.S.C. 31. There is no statute of limitations for correction of overpaid self employment and withheld social security taxes. 26 U.S.C. 6521 26 U.S.C. 6402(a) applies any overpayment of any federal tax to any other kind of tax. The logical result of the application of the tax statutes is that the individual Plaintiffs be credited with all the taxes they paid as a result of assessment of the 100% penalty of 6672 and all the employment taxes paid by Plaintiff corporation. Further, the amount should be transmitted to the Social Security Administration.

The Internal Revenue Service also refused to apply maximum limits to the Plaintiffs, even though the Defendant's auditor knew the wage base of 26 U.S.C. 3121(a)(1) was exceeded. *Bubble Room v U.S.*, 159 F.3d 553, 562 (Fed. Cir. 1998).

C. Procedural Background

Plaintiffs bring this action to recover from the United States of America, Defendant herein, the following sums, or such other amounts as the Court may determine to be lawfully due, together with interest thereon according to law. In addition, pursuant to Title 28 U.S.C. § 1920, 26 U.S.C. 7430 and 42 U.S.C. 1983 Plaintiffs request that they or any one of them be awarded attorneys' fees and costs of bringing this action. The Plaintiff individuals and the Plaintiff's corporation's respective net worth does not exceed the maximum required to obtain 26 U.S.C. 7433 relief. This action is for recovery of income, FICA taxes, withholding taxes, Medicare taxes, 26 U.S.C. 6672 penalties, other penalties and interest

for 1994 and 1995. It is founded upon the Internal Revenue Code of 1986 and is filed within the period prescribed by the Internal Revenue Code for bringing such a suit for the recovery of FICA, and HI taxes and interest. This Court has jurisdiction by reason of 26 U.S.C. 7422(a), 7433, and 28 U.S.C. 1491(a)(1). The refund cause of action is brought within two years of the disallowance as allowed by 26 U.S.C. 6532(a)(1).

FACTUAL ALLEGATIONS.

1. Plaintiff corporation is a Washington State corporation with its current principal place of business located at 905 W. Riverside Ave., Suite 505, Spokane, WA 99201. Plaintiff corporation's employer identification number is 91-1151845.

2. The individual Plaintiffs residence is at 4603 S. Pittsburg St, Spokane, WA 99223. The Social Security number for Yvonne R. Kovacevich is XXX-XX-2268 and Robert E. Kovacevich is XXX-XX-7726.

3. The individual Plaintiff paid $8,276.50 on November 23, 2004; also paid $7,374 40 on April 28, 2004 and $7,682.00 on September 29, 2003. These amounts paid quarters for 1994 and 1995 of a 26 U.S.C. 6672 100% penalty assessment against Robert E. Kovacevich. The 100% penalty was cancelled by the Internal Revenue Service on February 12, 2008.

4. The 100% penalty amounts alleged above were paid as a result of an assessment' against Robert E. Kovacevich as a responsible officer of Western Management Inc., for withholding taxes. The periods assessed were for 941 withholding taxes commencing March 31, 1994 and inclusive for all quarters through March 31, 1995 Western Managements Inc., alleged failure to withhold taxes was exclusively for Robert

E. Kovacevich, who the Internal Revenue Service reclassified from an independent contractor to an employee. The withholding taxes were assessed by the Internal Revenue Service for only the earnings distributed to Robert E. Kovaceivch, the only worker in controversy The Internal Revenue Service audited Plaintiff, Yvonne R. Kovacevich and Robert E. Kovacevich at the same time for the years 1992, 1993 and 1994. The audit periods overlap only in the year 1994 All the taxes assessed against Western Management Inc., had already been paid by the individual Plaintiffs with their 1040 tax return. The assessment of Robert E. Kovacevich was for taxes he had already paid as a self employed worker for Western Management Inc. 26 U S C 3402(d) and 3406 (h)(10), require all withheld taxes to be credited to the recipient of the income. Kovacevich was the recipient of the same income. The same Internal Revenue Service Audit Agent, Dianne Gardner, audited all the Plaintiffs at the same time. She was given all the applicable 1040 tax returns of the Plaintiffs and admitted that the individual Plaintiffs had paid the tax on the same income distributed by the corporation. The audit of Western Management Inc., was for the fiscal year ended March 1994 and the first quarter of 1995. The Internal Revenue Service knew who the withheld taxes should have been credited to but consciously failed, neglected and refused to credit Robert E. Kovacevich with the taxes withheld. The audit agent also refused to notify the Social Security Administration to credit the additional taxes assessed to social security earnings record of Robert E. Kovacevich. Robert E. Kovacevich is receiving social security payments and is damaged by not obtaining the social security amount to which he should have been entitled.

5. The Internal Revenue Service Collection Officer, Randle Bodner, knew of all the facts of the audits at time of collection in 2004 but did not cancel the 26 U.S.C. 6672 penalty Western Management Inc., had executed extensions for assessment. The 100% penalty was finally cancelled in 2008. No such extensions were requested or granted by Robert E. Kovacevich to extend the assessment of the 100% penalty. To be valid to extend the statute of limitations, extensions must detail the affected item involved. The corporation extensions did not and could not apply to a potentially responsible officer. No extension of any statute of limitations included the possible assessment of a responsible officer 26 U.S.C. 6672 penalty. The assessment of the 100% penalty was both wrong and beyond the statute of limitations.

6. On May 10, 2004 the individual Plaintiff, Robert E. Kovacevich, was assessed the penalty ad hoc without a personal interview and the usual administrative procedure as required by the Taxpayers Rights Act and 26 U.S.C. 6304(b)(4) a statute providing that Fair Debt Collection Procedures be utilized by the Internal Revenue Service. Plaintiffs, on or about December 7, 2004 and again on July 20, 2006 filed claims for refund and request for damages as required by 26 U.S.C. 7433. The refund claim was denied on October 6, 2006. Plaintiff Robert E. Kovacevich also filed an administrative claim for social security credits, lost income and other damages with Howard Manaka and Gerald Reese, Western Regional Collection and Audit Managers on December 10, 2004 The claim conformed to the requirements of 26 C.F.R. § 301.7433-1(e)(2) and 7432-1(f)(2). The assessments against Plaintiffs and each of them was negligent, willful and malicious. It also

violated the laws of equal protection as alleged in this complaint.

7. The assessment for unpaid taxes of Plaintiff Robert E. Kovacevich who had, within extensions, timely filed and timely paid his 1994 and 1995 income taxes. The 100% penalty, 26 U.S.C. 6672 assessment, was for taxes long since paid by the same person, Plaintiff Robert E. Kovacevich.

8. The assessment of the 100% penalty was 8 or 9 years after the statute of limitations had expired as Plaintiff Western Management Inc., had timely filed and timely paid in full all taxes with its forms 941 for all the quarters commencing March 31, 1994 through March 31, 1995

9. The issue of whether Western Management Inc., owed unpaid withholding tax, was not finally adjudicated until August 3, 2007 as case number 12686-99 was not final when the 26 U.S.C. 6672 penalty was assessed. The ultimate finding in the case was that none of the withholding taxes for the periods March 31, 1994 through March 31, 1995 were legally assessed. The decision abrogated the withholding taxes and was entered on or about August 3, 2007 Plaintiff, Robert E. Kovacevich, raised the issue in 1988 that led to the 2007 decision. The Internal Revenue Service, through its agent, carelessly, negligently, intentionally, wrongfully and maliciously refused to cancel the audits and harassed Plaintiffs by failing to follow the law of 26 U.S.C. 3402(d) and 26 U.S.C. 3406(h)(10). The Internal Revenue Service also alleged the same amounts for the same periods and refused social security credit to the same periods refusing to make the credits unless the Plaintiffs settled. 26 U.S.C. 6521 suspends the period of limita-

tions for all withholding and social security tax paid as a result of allegations of reclassification.

10. Western Management Inc., paid $21,995 48 on March 30, 1991 for Social Security taxes of Robert E. Kovacevich for the period 1989 through September 30, 1990 These taxes were beyond the social security wage base of 26 U.S.C. 3121(a)(1)that applied for the quarters stated as Robert E. Kovacevich had paid maximum self employment taxes for 1992, 1993, 1994 and 1995 overlapping the same periods on his timely filed, within extensions, 1040 tax return forms SE.

11. For all the periods involved in this case, all Plaintiffs timely filed, within extensions, all Federal tax returns, forms 941, 940 and 1040 respectively Plaintiff, Western Management Inc., also is owed the sum of $18,622.16, the balance due of $22,530.20 paid September 30, 1995. This case is pending in the United States Court of Federal Claims, Number 97-340 T.

12. In the United States Tax Court case No. 12686-99, all of the withholding tax was eliminated on remand of the appeal from the Ninth Circuit. The social security tax and medicare was not eliminated and the case is now on appeal in the Ninth Circuit case number 07-74222.

13. All of the withholding tax allegations and all the social security tax and medicare taxes for all the years audited and assessed by the Internal Revenue Service against Plaintiff Western Management Inc., were all as a result of reclassification of Robert E. Kovacevich and no other person.

14. Plaintiff, Western Management Inc., had two or three other persons it classified as employees all during all periods involved. It timely filed 941 and

940 employment tax returns, reporting and timely paying all taxes withheld from the other persons.

15 Plaintiffs Yvonne R. Kovacevich and Robert E. Kovacevich, by virtue of 26 U.S.C. 31; 6521(a)(1)(2) and (3); 3402(d), 3406(h)(10); 6402, and 3503, are entitled to be credited all the sums alleged in this Complaint. The reason is that the person who receives the income always remains responsible for income tax 26 U.S.C. 3101, 3111. The employer is required to withhold as a means of helping the worker pay his or her tax. There is no statute of limitations as the credit is to be made to the year the tax was assessed against the employer. 26 U.S.C. 6521 mitigates the statute of limitations on employment taxes. The statute allows correction of erroneous treatment of self employment taxes if the correction of one employment tax would allow a refund of the other. The actual time paid is not the criterion, therefore the individual Plaintiffs are entitled to interest in the taxes for the period the tax was assessed and not the date paid.

FIRST CAUSE OF ACTION-REFUND OF EMPLOYMENT TAXES.

16. The individual Plaintiffs, for their First Cause of Action, by this reference, incorporate the introductory allegations and paragraphs 1 through 15, as if fully set forth in this First Cause of Action. The amounts of $8,276.50 paid on November 23, 2004, are due as a refund to the individual Plaintiffs as a credit against their 1994 taxes or repaid as a refund with interest from the date paid as the employer Western Management Inc's liability for the underlying employment tax was abrogated and cancelled on August 3, 2007.

17. In the alternative, the individual Plaintiffs allege that the $8,276.50 was to be credited to their individual income tax as the person who was assessed the 100% penalty was the same person whose tax withholding was the reason the amount of $8,276.50 was paid. The individual Plaintiffs were known to the Internal Revenue Service to be the only individuals for whom the tax was collected. Therefore, at least at the time the amount was paid, they should have been individually credited this amount by the Internal Revenue Service.

SECOND CAUSE OF ACTION-REFUND BY 26 U.S.C. 6521; EQUITABLE RECOUPMENT OR UNJUST ENRICHMENT.

18. The individual Plaintiffs, for their Second Cause of Action, by this reference and reallege the introductory allegations and paragraphs 1 through 17 as if fully set out in this Second Cause of Action.

19. The individual Plaintiffs paid $7,374 40 on April 28, 2004 and $7,782 on September 29, 2003 for an assessment of a 26 U.S.C. 6672 penalty

20. All of the sums alleged in the first and second cause of action were assessed many years after the statute of limitations had run against the assessment of a 26 U.S.C. 6672 penalty as the same limitation period for an assessment against the employer applies. The statute of limitations against the employer, Western Management Inc., for the quarters in 1994 and 1995 expired in 1997 and 1998.

21. The amounts alleged above should have been immediately credited to the individual Plaintiffs since the amount was assessed to pay their individual taxes.

22. In case Number 12686-99 in the United States Tax Court, the reason for the 26 U.S.C. 6672 penalty was abrogated as the Court held that sums were no properly assessed or were non collectible. The decision was rendered on August 3, 2007.

23. The Internal Revenue Service was unjustly enriched by its illegal conduct as it sought to be paid three times for the same employment taxes. The amounts they sought the second and third time, were abrogated by the United States Tax Court in 2007

24. Therefore, the sums alleged as wrongfully withheld, should be credited, refunded or paid as damages for wrongfully, intentional and negligent conduct by the Internal Revenue Service started in 1996 and continuously maintained to August 3, 2007.

THIRD CAUSE OF ACTION-DAMAGES.

25. All the Plaintiffs, for their Third Cause of Action, by this reference incorporate the introductory paragraphs and paragraphs 1 through 24, as if fully set forth in their Third Cause of Action.

26. The sum of $21,995.48 was paid to the Internal Revenue Service on March 31, 1991 for social security taxes of Robert E. Kovacevich for 1989 through September 30, 190 The taxes were not credited to the individual Plaintiffs as required by 26 U.S.C. 31.

27. All the taxes in this case result from reclassification of Robert E. Kovacevich from an independent contractor to employee. Double payment and double assessment of withholding social security and medicare taxes resulted. Plaintiffs were taxes twice on inconsistent theories. The taxes were later abrogated. If no other mitigation provision applies, the Plaintiffs

individuals are allowed income tax credits from wrongfully collected taxes on its behalf.

28. The amounts alleged in 26 above were wrongfully assessed against Western Management Inc., as the individual Robert E. Kovacevich, had fully paid his taxes and social security for the periods assessed. The credit required by 26 U.S.C. 3402(d) and 3406(h)(10) to Plaintiff Western Management Inc.

29 The tortuous action by the Internal Revenue Service started in 1991 or prior and was continuous as damages occurred all during the litigation action from that time until present.

30. Plaintiffs properly filed, paid taxes, and were entitled to credits against employment taxes. The Internal Revenue Service employees, through instructions by statute and the Internal Revenue Manual, were required to credit payments to the employment taxes and social security earnings record of Robert E. Kovacevich so that he would receive the proper amount of social security pension. Plaintiffs requested at least three employees of the Defendant to apply credits. The employees conspired against Plaintiffs and refused to make refunds and credit required by statute regulations and instructions to these employees. These employees refused, thereby denying Plaintiffs their constitutional and statutory right to remuneration. The refusal, commencement and continued litigation was an abuse of process. It was also open, notorious, hostile, intentional, malicious, and without claim of right and in a conspiracy to violate federal law. The conduct against Plaintiffs was to hinder, impede and obstruct the individuals right of refund of social security pension and equal protection of the laws, within the meaning of 42

U.S.C.A. 1983 § 1985(2); 42 U.S.C.A. § 1985(3) and *Mark v Groff*, 521 F.2d 1376 (9th Cir 1975).

31. The wrongful, negligent, intentional and malicious actions of the Internal Revenue Service caused damages to all the Plaintiffs in the amount of all payments alleged above and economic damages in the total amount of $6,918.75 or such greater amount as may be proven in this case.

WHEREFORE, the Plaintiffs request the following relief, some of which is in the alternative.

1 For a refund or credit of $8,276.50 paid on November 23, 2004, with interest.

2. For a credit or refund of $8,276.50 to the individual Plaintiffs 1995 taxes and a refund with interest from October 15, 1996.

3. For a refund or credit of the amounts of $7,374.40 paid on April 28, 2004 and $7,682.00 paid on September 29, 2003 to the individual Plaintiffs.

4. For a credit or refund of $21,995.48 plus interest from March 30, 1991 to either the individual Plaintiffs pursuant to 26 U.S.0 31 or other law or to the Plaintiff corporation.

5. For a judgment that all the sums paid, as a result of the assessments, be credited to the individual Plaintiffs as they were the recipients of the income the ones whose employment tax was to be paid by the assessments.

6. For damages in the amount of $6,918.75 or such other amount as may be proven as economic damages pursuant to 26 U.S.C. 7433.

7. For damages in the amount in the alternative, of $6,918.75 plus attorneys fees and multiples as may

be allowable under 42 U.S.C. 1988 or other provisions of 42 U.S.C. 1983 *et seq*.

DATED this 27th day of February, 2008.

WESTERN MANAGEMENT INC

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R.C.F.C. 7.1(a) DISCLOSURE STATEMENT

Plaintiff Corporation has no present corporation. No publically held corporation or owns any stock in Plaintiff Corporation.

DATED this 27th day of February, 2008.

/s/ YVONNE R. KOVACEVICH
YVONNE R. KOVACEVICH

/s/ ROBERT E. KOVACEVICH
ROBERT E. KOVACEVICH

# APPENDIX E

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed Apr 3 2009]

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No. 08-116 T

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WESTERN MANAGEMENT, INC., YVONNE R. KOVACEVICH and ROBERT E. KOVACEVICH,
*Plaintiffs*

v.

THE UNITED STATES,
*Defendant*

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(Judge Firestone)

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## AMENDED ANSWER AND COUNTERCLAIM[1]

As an initial matter, defendant objects, pursuant to Rule 8(a) of the Rules of the Court of Federal Claims (RCFC), to the complaint's nearly five pages of "Introduction," "Overview," and "Procedural Background," on the ground that they do not set forth "a short and plain statement" of the grounds for jurisdiction, grounds for relief, or a demand for judgment

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[1] On March 20, 2009, this Court issued an order permitting the filing of defendant's counterclaim against plaintiff-counter defendant Western Management, Inc. ("WMI"), and dismissing without prejudice the counterclaim against plaintiffs-counter defendants Robert E. and Yvonne R. Kovacevich. *See*, Order, Mar. 20, 2009 at 8. The Court granted defendant the opportunity to amend the counterclaim in accordance with that Order. The amended counterclaim is contained herein.

for the relief sought. For these reasons, no response is required to the allegations contained in the "Introduction," "Overview," or "Procedural Background." To the extent the complaint alleges jurisdiction over this action in the "Procedural Background" section on page 5, alleging jurisdictional bases for this action, defendant denies those allegations. Defendant avers that jurisdiction over this action is predicated, if at all, on 26 U.S.C. § 1491.

Defendant further restates and incorporates by reference herein its responses to paragraphs 1-31 of the complaint, as well as Additional Defenses 1-5, asserted in its answer filed October 27, 2008.

COUNTERCLAIM

For its counterclaim against plaintiffs-counter defendants WMI, Robert E. Kovacevich, and Yvonne R. Kovacevich, the United States alleges as follows:

1. This counterclaim has been authorized by the Chief Counsel of the Internal Revenue Service, a delegate of the Secretary of the Treasury, and is brought at the direction of the Chief of the Court of Federal Claims Section, Tax Division, Department of Justice, a delegate of the Attorney General of the United States, pursuant to 26 U.S.C. § 7401 and 28 U.S.C. § 1503.

2. On January 20, 2004, Judge Maurice B. Foley of the United States Tax Court ordered and decided that counterdefendant WMI was liable for FICA, FUTA, income tax withholding (ITW), additions to tax, and penalties for all four quarters of 1994 and the first quarter of 1995, as a result of plaintiff-counterdefendant Robert E. Kovacevich's classification as a statutory employee of WMI. That order was

affirmed in all respects by the United States Court of Appeals for the Ninth Circuit on April 12, 2006.

3. On the date of the Tax Court's order, individual plaintiffs Robert E. Kovacevich and Yvonne R. Kovacevich had not paid income taxes on wages earned from WMI in 1994 and 1995. Thereafter, in 2004, they satisfied their personal income tax obligations for those years.

4. On or about August 3, 2007, the Tax Court, upon the IRS's motion based on Code § 3402(d), entered an order precluding the IRS from collecting ITW for 1994 and the first quarter of 1995 from WMI to the extent that Robert E. Kovacevich had paid the related income tax. The order did not, however, affect WMI's liabilities for the remaining amounts of ITW, FICA, FUTA, interest, and penalties. The IRS abated the assessments of the appropriate amounts of ITW, pursuant to the Tax Court's order, from WMI's accounts on or about October 29, 2007.

5. Plaintiffs appealed Judge Foley's August 3, 2007 Order, and on February 23, 2009, the Ninth Circuit affirmed the Tax Court's decision.

6. WMI has still not satisfied its remaining liabilities for ITW, FICA, FUTA, penalties, and interest for the four quarters for 1994 and the first quarter of 1995. WMI's total outstanding liability for the first quarter of 1994, calculated as of March 20, 2008, is $18,531.00 plus assessed and statutory interest pursuant to 26 U.S.C. § 6601. WMI's total outstanding liability for the second quarter of 1994, calculated as of March 20, 2008, is $23,583.92 plus assessed and statutory interest pursuant to 26 U.S.C. § 6601. WMI's total outstanding liability for the third quarter of 1994, calculated as of March 20, 2008, is

$14,188.97 plus assessed and statutory interest pursuant to 26 U.S.C. § 6601. WMI's total outstanding liability for the fourth quarter of 1994, calculated as of March 20, 2008, is $13,620.60 plus assessed and statutory interest pursuant to 26 U.S.C. § 6601. WMI's total outstanding liability for the first quarter of 1995, calculated as of March 20, 2008, is $16,857.59 plus assessed and statutory interest pursuant to 26 U.S.C. § 6601.

7. Robert E. Kovacevich was the sole incorporator of WMI.

8. WMI was incorporated by Robert E. Kovacevich on October 1, 1981 in the state of Washington, as Robert E. Kovacevich, P.S.

9. The Articles of Incorporation of Robert E. Kovacevich, P.S. named as the first directors of the corporation Robert E. Kovacevich and his wife Yvonne R. Kovacevich, both residing at 4603 S. Pittsburg, Spokane, Washington 99201.

10. The paid-in-capital of Robert E. Kovacevich, P.S. at the time of incorporation was $500.00.

11. Robert E. Kovacevich, P.S. later changed its name to WMI.

12. From 1981 through 1997, Robert E. Kovacevich controlled WMI.

13. From 1981 through 1997, Robert E. and Yvonne R. Kovacevich were the sole owners of WMI.

14. During 1994 and 1995, no officers or directors of petitioner were elected, but Robert E. Kovacevich acted as president.

15. During 1994 and 1995 WMI held no formal or informal meetings.

16. WMI had no corporate minutes book.

17. WMI did not file a Form W-2 for Robert E. Kovacevich in 1994 or 1995.

18. WMI did not file a Form 1099-MISC for Robert E. Kovacevich in 1994 or 1995.

19. During the years 1994 through 1995, WMI filed its returns as a "C" corporation for income tax purposes.

20. Plaintiffs have stated that the formation of WMI "was never completed," and that it is "merely a shell or nominee corporation of the individuals."

21. Robert E. Kovacevich is currently a director of WMI.

22. Yvonne R. Kovacevich is currently the president and a director of WMI.

23. During 1994 WMI paid Robert E. Kovacevich $132,000.

24. During the first quarter of 1995 WMI paid Robert E. Kovacevich $33,250.

25. On WMI's corporate income returns for 1994 and 1995 respectively, WMI deducted "officers' compensation" expenses in the amounts of $132,000 and $133,000.

26. WMI issued checks to Robert E. and Yvonne R. Kovacevich's personal creditors, including, *inter alia,* Nordstrom, Teneff Jewelry, Fit and Hollywood, and National Golf. Payments to these creditors did not further the corporate purpose.

27. These payments were classified as "loans" on the corporate ledgers.

28. No Form 1099-MISC, Miscellaneous Income was filed relating to these payments.

29. Robert E. Kovacevich owned or controlled WMI's bank account.

30. WMI maintained a pooled trust account.

31. Robert E. Kovacevich did not maintain a pooled trust account separate from WMI's pooled trust account during the relevant years.

32. Robert E. Kovacevich knowingly failed to cause WMI to withhold employee income taxes, as well as FICA and FUTA taxes, during the relevant years.

33. Robert Kovacevich's actions or failure to act directly resulted in a large amount of unpaid taxes, penalties, and interest due and owing to the defendant-counterplaintiff, the United States.

34. At the time of WMI's duty to withhold employee income taxes, FICA, and FUTA, WMI had no assets.

35. At the time WMI was assessed for failure to withhold employee income taxes, FICA, and FUTA, WMI had no assets.

36. Plaintiffs admitted in a petition filed April 28, 2008 in the United States Tax Court, filed in *Western Management, Inc. v. Commissioner,* Docket No. 9745-08, that amounts paid by WMI to Robert E. Kovacevich are the community property of Yvonne R. Kovacevich. Plaintiffs also admitted in that petition that: (a) WMI has very few assets; (b) WMI has no assets and has never had any assets; (c) WMI in all the years in question acted as the "alter ego" of Robert E. Kovacevich; (d) from 1963 until the present all funds paid from clients of Robert E. Kovacevich were deposited into a bank account belonging to Robert E. Kovacevich and were withdrawn by checks

solely written by him; (e) all assets used in the practice of law by Robert E. Kovacevich before and after incorporation were owned by Robert E. Kovacevich, including the business lease, office furniture, client list, files, storage areas, brief books, and all tangible and intangible items used to carry on the business.

37. WMI, directed by Robert E. Kovacevich and his wife Yvonne R. Kovacevich, has no assets from which WMI's debt to the United States may be satisfied.

38. Plaintiffs have stated in a recent Tax Court petition that WMI was the "alter ego" of Robert E. Kovacevich.

39. Washington State is a community property state.

40. WMI, prior to and during the 1994 and 1995 tax years, was the alter ego of plaintiff-counter defendant Robert E. Kovacevich. Robert E. Kovacevich and Yvonne R. Kovacevich are therefore personally liable for WMI's liabilities.

41. The defendant-counterplaintiff will be unable to collect WMI's liabilities for taxes, interest, and penalties without holding Robert E. Kovacevich and Yvonne R. Kovacevich personally liable.

42. Failure to hold Robert E. Kovacevich and Yvonne R. Kovacevich personally liable for WMI's tax liability will result in the violation of a duty, and unjustified loss, to the defendant-counterplaintiff, the United States.

WHEREFORE, the complaint should be dismissed with prejudice, with costs assessed against the plaintiffs; and judgment should be entered against plaintiff WMI and against individual plaintiffs

Robert E. Kovacevich and Yvonne R. Kovacevich and in favor of the United States on its counterclaim.

Respectfully submitted,

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Dated: April 3, 2009

## APPENDIX F

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

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No. 08-116 T

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WESTERN MANAGEMENT, INC., YVONNE R. KOVACEVICH and ROBERT E. KOVACEVICH,
*Plaintiffs*

v.

THE UNITED STATES,
*Defendant*

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(Judge Firestone)

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### PLAINTIFFS MOTION TO STRIKE AMENDED COUNTERCLAIM WITH CITATIONS OF AUTHORITY

Pursuant to Rule 12 of the Rules of the United States Court of Federal Claims, Plaintiffs Western Management Inc., Yvonne R. Kovacevich and Robert E. Kovacevich respectfully object to Defendants Amended Counterclaim and move that it be stricken pursuant to Rule 12(a). The Amended Counterclaim is void as it is filed in violation of Rule 12(b)(2), lack of jurisdiction of the subject matter and 12(a)(6), for failure to state a claim upon which relief may be granted. The complaint cannot be dismissed on the basis of the amended counterclaim as the complaint complies with pleading requirements.

This objection is also based on the declaration of Robert E. Kovacevich previously filed in this case. The specific objections are as follows:

1. The Counterclaim is preempted by specifically drawn, detailed later enacted statutes detailing collection remedies that are exclusive to other courts.

2. Defendant cannot counterclaim to collect a third party Tax Court judgment as the Court of Federal Claims has no jurisdiction to collect a Tax Court judgment. The United States District Court has exclusive jurisdiction to collect a judgment. 26 U.S.C. 7426(a)(1) and (b).

3. The individual Plaintiffs have the right to challenge interest abatement allowed by 26 U.S.C. 6404(e)(1),(2) and (3). Pursuant to *Hinck v. United States,* 550 U.S. 501 (2007). This proceeding is preempted by exclusive Tax Court jurisdiction.

4. The counterclaim contains many false and improper allegations that cannot be alleged on information and belief and should be stricken. The counterclaim does not state a claim upon which relief can be granted, especially when the false allegations are stricken. The true facts are in possession of the Internal Revenue Service public records or available by phone or e-mail to Plaintiffs. Among the allegations that are improper are the following:

> 4. On or about August 3, 2007, the Tax Court, upon the IRS's motion base on Code § 3402(d), entered an order precluding the IRS from collecting ITW for 1994 and the first quarter of 1995 from WMI to the extent that Robert E. Kovacevich had paid the related income tax. The order did not, however, affect WMI's liabilities for the remaining amounts of ITW, FICA, FUTA, interest, and penalties. The IRS abated the assessments of the appropriate amounts of ITW, pursuant to the Tax Court's order, from WMI's

accounts on or about October 29, 2007. There were no remaining amounts to income tax and social security was not due. The case has not yet been remanded.

5. Plaintiffs appealed Judge Foley's August 3, 2007 Order, and on February 23, 2009, the Ninth Circuit affirmed the Tax Court's decision. Plaintiffs, Robert E. Kovacevich and Yvonne R. Kovacevich were not parties.

6. WMI has still not satisfied its remaining liabilities for ITW, FICA, FUTA, penalties, and interest for the four quarters for 1994 and the first quarter of 1995. Western Management Inc., is current in its liabilities and has not received any revised judgment.

7. Robert E. Kovacevich was the sole incorporator of WMI. The corporation was changed to Western Management Inc., in 1997. It was changed by an officer.

9. The Articles of Incorporation of Robert E. Kovacevich, P.S. named as the first directors of the corporation Robert E. Kovacevich and his wife Yvonne R. Kovacevich, both residing at 4603 S. Pittsburg, Spokane, Washington 99201. There were three directors and owners listed in the 1997 articles.

10. The paid-in-capital of Robert E. Kovacevich, P.S. at the time of incorporation was $500.00. The paid-in-capital was $185,000 or more. The balance sheets attached to filed in the 1992 1120 tax returns is listed as $277,280.

12. From 1981 through 1997, Robert E. Kovacevich controlled WMI. There was no WMI as such

Robert E. Kovacevich worked as the required professional in Robert E. Kovacevich P.S. Others, including directors, controlled Robert E. Kovacevich P.S. Robert E. Kovacevich ran the required law practice.

14. During 1994 and 1995, no officers or directors of petitioner were elected, but Robert E. Kovacevich acted as president. The prior named directors ran the corporation as directors.

15. During 1994 and 1995 WMI held no informal meetings. Meetings took place as needed.

16. WMI had no corporate minutes book. The corporation has had a corporate minutes book for many years.

19. During the years 1994 through 1995, WMI filed its returns as a "C" corporation for income tax purposes. All required 1120 forms have been filed since 1982.

20. Plaintiffs have stated that the formation of WMI "was never completed," and that it is "merely a shell or nominee corporation of the individuals." If not sooner, completion occurred in 1997. Yvonne R. Kovacevich has never made such statements. After 1997 no statements were ever made by anyone.

23. During 1994 WMI paid Robert E. Kovacevich $132,000. This amount is incorrect. Yvonne R. Kovacevich received payments. Some payments were cash.

24. During the first quarter of 1995 WMI paid Robert E. Kovacevich $33,250. This amount is incorrect. Yvonne R. Kovacevich received payments. Some payments were cash.

29. Robert E. Kovacevich owned or controlled WMI's bank account. WMI had no bank account until after 1997.

30. WMI maintained a pooled trust account. The account is maintained by Robert E. Kovacevich as required by state law license.

31. Robert E. Kovacevich did not maintain a pooled trust account separate from WMI's pooled trust account during the relevant years. This is false. It was maintained by the professional.

32. Robert E. Kovacevich knowingly failed to cause WMI to withhold employee income taxes, as well as FICA and FUTA taxes, during the relevant years. This is a totally false, misleading and improper allegation. WMI had employees it classified as employees. The corporation timely filed and timely paid all 940 and 941 employment tax returns in total compliance with all employment tax laws and regulations, including the relevant years. All the returns are in the possession of the Internal Revenue Service and were never audited in the audit of WMI, which took place as early as 1988. From 1981 through 1997 Robert E. Kovacevich was the sole owner of WMI. Robert E. Kovacevich has no direct ownership in WMI. Yvonne R. Kovacevich is a minority owner.

33. Robert E. Kovacevich's actions or failure to act directly resulted in a large amount of unpaid taxes, penalties, and interest due and owing to the defendant-counterplaintiff, the United States. This is a false statement as all taxes were paid by the individual. WMI is entitled to complete credit and also has refunds pending.

34. At the time of WMI's duty to withhold employee income taxes, FICA, and FUTA, WMI had no assets. This statement is totally false as all the income tax withholding FICA and FUTA was paid from a positive bank balance. The taxes were paid on all the same income. At the time of payment WMI had and still has assets. WMI also has accounts, credit and refund receivables.

35. At the time WMI was assessed for failure to withhold employee income taxes, FICA, and FUTA, WMI had no assets. This statement is totally false as all the income tax withholding FICA and FUTA was paid from a positive bank balance. The taxes were paid on all the same income. At the time of payment WMI had and still has assets. WMI also has accounts, credit and refund receivables.

37. WMI directed by Robert E. Kovacevich and his wife Yvonne R. Kovacevich, has no assets from which WMI's debt to the United States may be satisfied. This is a false and reckless statement as WMI has assets. Defendants failed to review balance sheets or the returns.

40. WMI, prior to and during the 1994 and 1995 tax years, was the alter ego of plaintiff-counterdefendant Robert E. Kovacevich. Robert E. Kovacevich and Yvonne R. Kovacevich are therefore personally liable for WMI's liabilities. This statement is false as Tax Court Judge Maurice Foley held that the company was not an alter ego. The judgment is *res judicata*.

41. The defendant-counterplaintiff will be unable to collect WMI's liabilities for taxes, interest, and penalties without holding Robert E. Kovacevich

and Yvonne R. Kovacevich personally liable. This is a false statement based on conjecture and supposition.

42. Failure to hold Robert E. Kovaceivch and Yvonne R. Kovacevich personally liable for WMI's tax liability will result in the violation of a duty, and unjustified loss, to the defendant-counterplaintiff, the United States. This is a false statement as stockholders have no duty to creditors of a corporation, especially one who has no ownership and one who is a minority owner.

5. The Counterclaim is barred by the specific 3 year statute of limitations of 26 U.S.C. 6501 and 6501(b)(2). Transferee liability must be asserted in District Court one year after the statute of limitations has expired against the transferee. 26 U.S.C. 6901)c)(1). The time has expired by over ten years.

6. Since a complete credit of employment taxes is allowed between the individual Plaintiffs and the corporate Plaintiffs, requiring the individuals to pay the same employment taxes is a nullity.

7. The assertion of an alter ego theory in this case is preempted by 26 U.S.C. 6672 that allows the IRS to assess employment taxes on a trust fund theory against the responsible officer. The statute allows jurisdiction in the Court of Claims. The IRS tried to assess the penalty but the statute of limitations for this action expired in 1998 or earlier. The statutes state on their relevant portions as follows:

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General rule.—Any person required to collect, truthfully account for, and pay over any

tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provide by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

(g)(3) Statute of limitations.—If a notice described in paragraph (1) with respect to any penalty is mailed or delivered in person before the expiration of the period provided by section 6501 for the assessment of such penalty (determined without regard to this paragraph), the period provided by such section for the assessment of such penalty shall not expire before the later of—

(A) the date 90 days after the date on which such notice was mailed or delivered in person, or

(B) if there is a timely protest of the proposed assessment, the date 30 days after the Secretary makes a final administrative determination with respect to such protest.

(2) Suit must be brought to determine liability for penalty.-If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Claims) for the

> determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.
>
> The individuals timely protested in 2004.

8. The question of whether the individuals were one and the same with the corporation has already been litigated and decided in the Defendant's favor. Hence, it is barred by judicial estoppel, issue preclusion or other legal principles.

9. The relatively new statutes of 26 U.S.C. 6320 and 6330 give exclusive jurisdiction of collection actions in the U.S. Tax Court and preempt the counterclaim. These statutes apply to any Internal Revenue taxes. They are precisely drawn detailed statutes that apply to tax collection and give exclusive court review in the U.S. Tax Court. They are independent in addition to 26 U.S.C. 6404 review. Defendant cannot collect against the individual Plaintiffs in this Court. For a Tax Court judgment against the corporation a non litigant in the case must be able to have an "opportunity to present every available defense" *American Surety v. Baldwin*, 287 U.S. 156, 164, 53 S.Ct. 98, 77 L.Ed 231 (1932); *Philip Morris USA v. Williams*, 549 U.S. 346, 354, 127 S. Ct. 1057, 166 L.Ed 2d 940 (2007).

10. 26 U.S.C. 7426(a)(1) and (b) grants jurisdiction, including injunctive relief by third parties, in the U.S. District Court. It states:

> § 7426. Civil actions by persons other than taxpayers
>
> (a) Actions permitted.—if a levy has been made on property or property has been sold

pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

(b) Adjudication.—The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction.—If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

This court must yield to other courts as statute is precisely drawn and detailed. It gives exclusive collection jurisdiction to the Federal Courts.

11. Defendant is barred from seeking a judgment against the individual Plaintiffs for the corporate Plaintiffs taxes by the three or four year statutes of limitation of 26 U.S.C. 6501. It states:

§ 6501. Limitations on assessment and collection

(a) General rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before

the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection on such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit.

(2) Return of certain employment taxes and tax imposed by chapter 3.—For purposes of this section, if a return of tax imposed by chapter 3, 21, or 24 for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

12. The Court of Claims is a Court of limited jurisdiction. The Tucker Act, 28 U.S.C. 1491 is preempted by the exclusive collection jurisdiction of the United States District Court and United States Tax Court applying taxpayer rights. The counterclaim denies administrative collection due process pursuant to 26 U.S.C. 3232, 6330(a), 7421, 7426(a)(1); 26 U.S.C. 3505 and 26 U.S.C. 6672. Exclusive jurisdiction is in the United States Tax Court. Some Internal Revenue code sections apply only to the actual taxpayer. Collection due process applies to any person liable to pay any tax, 26 U.S.C. 6321; 26 U.S.C. 6320, 6330; the statute that allows a hearing and court jurisdiction to review whether the collection gives the person due process applies to "any person" 26 U.S.C. § 6320(a)(1); § 6321; 6330(a)(1). These statutes state:

Sec. 6320. Notice and opportunity for hearing upon filing of notice of lien.

(a) Requirement of notice.

(1) In general. The Secretary shall notify in writing the person described in section 6321 of the filing of notice of lien under section 6323.

(2) Time and method for notice. The notice required under paragraph (1) shall be—

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address,

(3) Information included with notice. The notice required under paragraph (1) shall include in simple and nontechnical terms—

(A) the amount of unpaid tax,

(B) the right of the person to request a hearing during the 30-day period beginning on the day after the 5 day period described in paragraph described in paragraph (2),

(C) the administrative appeals available to the taxpayer with respect to such lien and the procedures relating to such appeals, and

(D) the provisions of this title and procedures relating to the release of liens on property.

(b) Right of fair hearing.

(1) In general. If the person requests a hearing under subsection (a)(3)(B), such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) Impartial officer. The hearing under this subsection shall be conducted by an officer or employee who has had no involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section. A taxpayer may waive the requirement of this paragraph.

(c) Conduct of hearing: review; suspension.

For purposes of this section, subsections (c), (d) (other than paragraph (2)(B) thereof, and (e) of section 6330 shall apply.

Sec. 6330. Notice and opportunity for hearing before levy.

(a) Requirement of notice before levy.

(1) In general. No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(d) Proceeding after hearing.

(1) Judicial review of determination. The person may, within 30 days of a determination under this section, appeal such determination—

(A) to the Tax Court (and the Tax court shall have jurisdiction with respect to such matter); or

(B) if the Tax court does not have jurisdiction of the underlying tax liability, to the district court of the United States.

> If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

13. *Robinette v. Commissioner of Internal Revenue*, 439 F.3d 455, 458 (8th Cir. 2006), summarize the new statutes as follows:

> Prior to 1998, the IRS was permitted to collect a tax liability by levy against a taxpayer's property, without prior opportunity for a hearing or due process, so long as there were adequate post-deprivation remedies. *See Phillips v. Comm'r*, 283 U.S. 589, 595-97, 51 S.Ct. 608, 74 L.Ed. 1289 (1931). Apparently concerned about potential abuses of this administrative authority to seize a taxpayer's property, Congress created an administrative proceeding, commonly known as a "collection due process hearing," in the Internal Revenue Service Restructuring and Reform Act of 1998. The applicable statute requires notice to the taxpayer of a right to a hearing before a levy is made, 26 U.S.C. § 6330(a), and guarantees the right to a fair hearing before an impartial officer from the Internal Revenue Service Office of Appeals. *Id.* 6330(b). In the hearing, the taxpayer may raise "any relevant issue relating to unpaid tax or the proposed levy," including "challenges to the appropriateness of collection actions," and "offers of collection alternatives, which may include . . . an offer-incompromise." *Id.* § 6330(c)(2)(A). The appeals officer then must consider whether any proposed collection action "balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection

> action be no more intrusive than necessary." 26 U.S.C. § 6330(c)(3)(c).
>
> The statute also affords a right of judicial review of the determination by the impartial hearing officer in either the Tax Court or a United States District Court, depending on whether the Tax Court has jurisdiction. *Id.* § 6330(d)(1). (underlining added).

The Senate Report (105-174) to Section 3401 of RRA 1998 included the requirement that the settlement officer consider installment agreements. The Report specifies what the IRS is to consider. The Report, in its relevant part, states:

> During the hearing, the IRS is required to verify that all statutory, regulatory, and administrative requirements for the proposed collection action have been met. IRS verifications are expected to include (but not be limited to) showings that:
>
> (1) the revenue officer recommending the collection action has verified the taxpayer's liability;
>
> (2) the estimated expenses of levy and sale will not exceed the value of the property to be seized;
>
> (3) the revenue officer has determined that there is sufficient equity in the property to be seized to yield net proceeds from sale to apply to the unpaid tax liabilities;
>
> and
>
> (4) with respect to the seizure of the assets of a going business, the revenue office recommending the collection action has thoroughly considered the facts of the case, including the availability of

alternative collection methods, before recommending the collection action.

The taxpayer (or affected third party) is allowed to raise any relevant issue at the hearing. Issues eligible to be raised included (but are not limited to):

(1) challenges to the underlying liability as to existence or amount;

(2) appropriate spousal defenses;

(3) challenges to the appropriateness of collection actions; and

(4) collection alternatives, which could include the posting of a bond, substitution of other assets, an installment agreement or an offer-in-compromise.) Underlining added).

Further, the Court's holding denies 26 U.S.C. 6304 protection of taxpayers that incorporate part of the Fair Debt Collection Practices Act 15 U.S.C. 1692b. The relevant part states:

(b) Prohibition of harassment and abuse.—The Secretary may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any unpaid tax. Without limiting the general application of the foregoing, the following conduct is a violation of this subsection:

(4) except as provided under rules similar to the rules in section 804 of the Fair Debt Collection Practices Act (15 U.S.C. 1692b), the placement of telephone calls without meaningful disclosure of the caller's identity.

This statute states:

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonable believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

14. The amended counterclaim also makes crediting allowed by 26 U.S.C. 6521 ineffective. This section and 26 U.S.C. 6413(a) and Regs. § 31. 6413(a)(1) allow repayment by agreement between employer and employee. 26 U.S.C. 3401(d)(1), allows control of wage payments. This statute preempts alter ego proceedings. The detailed statutes on collection of taxes preempt the general Federal Court of Claims remedy. The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, Title 1, Subtitle A, Section 3401(b) added detailed procedures requiring 30 days advance notice of the amount of unpaid tax. If jurisdiction exists in the Court of Claims, the procedures are not available to contest the tax, including administrative appeals. 26 U.S.C. 6330(b) also allows a fair hearing with an impartial officer to make sure that collection is no more intrusive than necessary, including allowance of installment payments.

*Hinck v. United States*, requires dismissal of the amended counterclaim. *Hinck v. United States*, 550 U.S. 501, 127 S. Ct. 2011, 167 L. Ed.2d 888 (2007) denied a Federal Court of Claims remedy for IRS Tax Code 6404(e). This case applies as 26 U.S.C. 6330 is that same type taxpayer Bill of Rights statute. *Hinck* eviscerated all IRS procedures for tax penalty review, interest, abatement review and collection of taxes. The Court of Federal Claims has no abatement jurisdiction nor any other jurisdiction of tax matters other than refund jurisdiction. All Courts are bound by a U.S. Supreme Court decision. This case is only a few years old. The holding applies to the Internal Revenue Code and states at 506:

> Section 6404(h) fits the bill on both counts. It is a "precisely drawn, detailed statute" that, in a

> single sentence, provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief. And Congress enacted this provision against a backdrop of decisions uniformly rejecting the possibility of any review for taxpayers wishing to challenge the Secretary's § 6404(e)(1) determination. Therefore, despite Congress's failure explicitly to define the Tax Court's jurisdiction as exclusive, we think it quite plain that the terms of § 6404(h) a "precisely drawn, detailed statute" filling a perceived hole in the law-control all requests for review of § 6404(e)(1) determinations. Those terms include the forum for adjudication.

*Hinck* is directly in point and requires that the counterclaim must be dismissed. The *Hinck* holding is that any proceeding to abate interest under 26 U.S.C. 6404(e)(1) must be brought in the United State Tax Court. The 6404(e)(1) proceeding is preempted and the Court of Federal Claims has no jurisdiction. 26 U.S.C. 6404(e)(1) applies to "any tax or any liability". Pursuant to 26 U.S.C. 6404(a), the Tax Court has jurisdiction to review the abuse of discretion of the IRS. F.I.C.A. employment taxes, can be abated under 26 U.S.C. 6404(b) as the employment tax is not within subsection (b). 26 U.S.C. 6404(h). Deficiencies in employment tax are generally not reviewable in Tax Court. However, 26 U.S.C. 7436 was added by the Taxpayer Relief Act of 1997, Pub. L. No. 105-4, 111 Stat. 788, Section 1055. Congress concluded that Tax Court review would be "advantageous to taxpayer to have the option of going to Tax Court to resolve certain disputes regarding employment taxes." H.R. Rep. No. 105-148 at 639

(1997). U.S. Code Cong. S Admin. News. 1997, 678, S. Rep. No. 105-33 at 304. Therefore, *Hinck* applies to misclassification and unequivocally requires dismissal as the individual Plaintiffs have a right to abate interest due to IRS managerial and ministerial delay of 10 or more years to assert liability. The 1997 amendment is analogous to income tax deficiencies. *Charlott's Office Boutique v. C.I.R.*, 425 F.3d 1203, 1209 (9th Cir. 2005); *Portillo v. Comm'r*, 932 F.2d 1128, 1132 (5th Cir. 1991), also apply. The worker is alleged to have additional income which requires a deficiency notice.

*Wagenknecht v. United States*, 533 F.3d 412, 416 (6th Cir. 2008), reviews a taxpayer bill of rights statute, 26 U.S.C. 6330 and concludes: "While jurisdiction for an appeal of a CDP determination related to income tax liabilities lies solely in the Tax Court, I.R.C. § 6330d; *Downing v. Comm'r*, 118 T.C. 22, 27-28, 2002 WL 15574 (2002); *Landry v. Comm'r*, 116 T.C. 60, 2001 WL 77050 (2001), jurisdiction over a Section 6702 civil penalties determination challenge rests in the district court alone". The Court of Federal Claims is never mentioned. A carefully circumscribed time limited IRS statute giving the Tax Court jurisdiction is regarded as exclusive. *Dacosta v. U.S.*, 82 Fed. Cl. 549 (2008) applies. It holds that a subsequent remedy, when no previous remedy was previously recognized, or when previous remedies were "problematic", the remedy is regarded as exclusive. The Tucker Act does not create a substantive cause of action. *Schell v. U.S.*, 84 Fed. Cl. 159, 163 (2008). In this case, the remedy of 26 U.S.C. 6672, the responsible officer specific remedy, is available and has a 3 year statute of limitations. The Tucker Act is a problematic remedy at best and the jurisdiction of misclassification of workers giving exclusive jurisdic-

tion to Tax Court jurisdiction, plus the due process remedy of 26 U.S.C. 6320 and 6330, all provide exclusive remedies in the Tax Court or United States District Court. Therefore, this court has no jurisdiction. In *De Costa*, the Court stated at 82 Fed. Cl. 555:

> The Supreme Court's reasoning in *Hinck* is applicable to subsection 7623(b)(4). The Supreme Court relied on the principles that "in most contexts, 'a precisely drawn, detailed statute preempts more general remedies,'" and "when congress enacts a specific remedy when no remedy was previously recognized, or when previous remedies were 'problematic,' the remedy provided is generally regarded as exclusive".

The *Hinck* holding is that when more precisely drawn detailed statutes for relief providing for specific remedies are enacted, the general statute is preempted.

*Hincks* construes an Internal Revenue Code Section that provided for time limits, a standard of review and judicial relief. The employment tax assessment, prior to granting Tax Court jurisdiction, could not be reviewed before payment. The 1982 statute gave the Tax Court jurisdiction. In addition, 26 U.S.C. 6320 and 6330 enacted in 1998, gave detailed methods of pre-collection remedies and Tax Court and District Court jurisdiction. *Hinck* is directly in point and preempts this Court's jurisdiction. The Tax Court is the exclusive forum for interest abatement. *United States v. Gill*, 2007 WL 2310790 M.D. Fla. 100 A.F.T.R. 2d 2007-5500; 2007-2 USTC p 50, 610 (2007).

*Prati v. U.S.*, 81 Fed. Cl. 422 (2008), also rejected jurisdiction of the Claims Court to abate Internal

Revenue Code penalties. 26 U.S.C. 7426(a)(1) enacted in 1982, gives persons other than taxpayers, a right to due in District Court for wrongful levy. These statutes are specific and enacted much later than the Tucker Act. Annual reminders must be given of tax amounts owed. 26 U.S.C. § 7524.

15. The essential facts are that Western Management Inc., classified Robert E. Kovacevich and no one else for four quarters or 1994 and one quarter of 1995 as independent contractor. Western Management Inc., classified two other persons as employees and timely filed and timely paid all required forms 941 and 940 tax returns. Robert E. Kovacevich paid all the social security earnings taxes as self employment taxes to the maximum wage base of 26 U.S.C. 3121(a). Further, all the personal taxes for these years were audited, settled and paid. Second audits are illegal. 26 U.S.C. § 7605(b). Robert E. Kovacevich cannot collect against Western Management Inc., for misclassification as the collection is prohibited by 26 U.S.C. 3403. Western Management Inc., is also indemnified. 26 U.S.C. 3102(b). The amended counterclaim allows collection against the person primarily liable for the tax but that person cannot cross claim against the entity that is supposed to withhold tax to help Robert E. Kovacevich pay his tax that he has already paid. Social Security payments now being paid will never be credited. The amended counterclaim is a ridiculous abuse of power.

16. The amended counterclaim allows the IRS to unlawfully collect social security tax in excess of the wage base. 26 U.S.C. 3121. *Bubble Room Inc., v. U.S.*, 159 F.3d 553, 567 (Fed. Cir. 1999), observes that where, as here, the government knows the FICA has been paid up to the wages base of I.R.C. 3121 (a)(1),

the collection is illegal. *Consolidated Flooring v. U.S.*, 42 Fed. Cl. 878 (1999), states that an employer is to be credited both F.I.C.A. and withholding taxes if the employee proves he paid the tax. The case also rejects inconsistent employment tax theories. *Sand Rock Land Co.*, 248 B.R. 174 (Bkcy. N.D. Cal. 2000), applies 26 U.S.C. § 3406(h)(10), requires abatement if the recipient reported the income and paid the tax. *Hoffman v. Comm'r*, 119 T.C. 140 (2002) a due process case, applied the 3 year statute of 26 U.S.C. 6501(a) to omitted partnership income. *Landry v. Comm'r*, 116 T.C. 60 (2001), also a 26 U.S.C. 6330 case, held that withholding payments can be applied within 3 years of the date paid. The Court held that the 1040 time limit was to apply to this first impression case. If Western Management pays, the individual payments will be an immediate credit. In the dissent by Judge Plager in *Bubble Room*, 159 F.3d at 568, the Court notes the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 stating that it is supposed to be "user friendly" and notes that the rate of tax is "the same for the employer and employee". The Judge also notes, 159 F.3d at 570, that the social security system is not "intended to generate tax income to the Treasury for which no employee receives wage credits . . . ." The illegal exaction prohibition applies to this appeal as the only "employee" is known and will receive no credit from the collection of a social security tax twice that is already paid.

The District courts, pursuant to 26 U.S.C. 3232 have exclusive jurisdiction of employment tax, including "application of the Attorney General", to compel the employee to comply with the employee obligations. Appellant, Robert E. Kovacevich, is the

reclassified employee. The collection statute states in full:

> Sec. 3232. Court jurisdiction.
>
> The several district courts of the United States shall have jurisdiction to entertain an application by the Attorney General on behalf of the Secretary to compel an employee or other person residing within the jurisdiction of the court or an employer subject to service of process within its jurisdiction to comply with any obligations imposed on such employee, employer, or other person under the provisions of this chapter. The jurisdiction herein specifically conferred upon such Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by such courts to entertain civil actions, whether legal or equitable in nature in aid of the enforcement of rights or obligations arising under the provisions of this chapter.

Civil actions for questioning third party tax liens are exclusively within the jurisdiction of the United States District Court. 26 U.S.C. 7421, 7426 (a)(1). The *Hincks* case is directly in point on the interest abatement issue of 26 U.S.C. 6404(e)(1) as ministerial and managerial delay is involved. Further, reduction to judgment is within exclusive jurisdiction of District Courts. *U.S. v. Gill*, 2007 W.L. 2310780, 100 AFTR 2d 2007-550 2007-2 U.S.T.C. 50.610 (D.C.M.D. Florida). Direct payment of wages by a person not an employer for FICA is allowed by 26 U.S.C. 3505. 26 U.S.C. 6672 provides that a person required to collect and who willfully fails to pay over is personally liable for the employment tax. The statute requires administrative procedures.

17. To determine the amount, the Tax Court of the United States since 1998 has exclusive jurisdiction of unpaid employment taxes resulting from reclassification to employee status. 26 U.S.C. 7436(a). Appellant Robert E. Kovacevich, was reclassified as an employee in the Tax Court proceeding. Since 2006, the United States Tax Court has exclusive jurisdiction of equitable recoupment 26 U.S.C. 6214(h). *Menard v. Commissioner of Internal Revenue*, 130 T.C. 54, 2008 WL 441046 (2008). All Plaintiffs were audited at the same time so the managerial delay or ministerial delay commenced in about 1998, eleven or more years ago.

The statute of limitations for collecting payroll taxes against third parties is three years. 26 U.S.C. § 6501(a); 26 U.S.C. 6501(b)(2). 26 U.S.C. § 6502(a)(1) requires that all taxes be collected within 10 years of assessment. 26 U.S.C. 7501(a) applies the same statute of limitation to employment taxes. Extensions must be entered into by the person who is requiring installments. 26 U.S.C. 6502(a)(1). The returns involved for all years were timely filed and timely paid as were the personal 1040 returns of Plaintiffs. The IRS on May 10, 2004, assessed a 100% penalty against Robert E. Kovacevich that included 1994. On November 23, 2004, Kovacevich paid $8,276.50 on the assessment. No one can deny that the IRS proceeded under 6672 and collected on the assessment. The statute allowing collection expired 13 years ago. A counterclaim must meet the three years from filing requirements of 26 U.S.C. 6501 (b)(2). *Anuforo v. Commissioner of Internal Revenue*, 103 A.F.T.R. 2d 2009-1020 (D. Minn. 2009) 2009 WL 697168 is in point.

In *Anuforo*, the Plaintiff was president of two companies. He admitted that he was the responsible officer of a company called Comfort Plus. The IRS counterclaimed to assess a 100% penalty for employment taxes for another company, U.S. Central. Regarding the counterclaim, the Court stated:

> On February 14, 2005, the IRS assessed taxes on Plaintiff for failure to pay social security taxes and employee withholding taxes for employees working for U.S. Central. The IRS assessed taxes for the quarters ending: June 30, 1999; September 30, 1999; March 31, 2001; December 31, 2001; September 30, 2002; December 31, 2002; and March 31, 2003. (Dutcher Decl. At Ex. 1). Plaintiff claims that the assessments made for quarters ending March 31, 2001, and December 31, 2001, are time-barred. Pursuant to 29 U.S.C. § 65011b)(2), these taxes are deemed filed on April 15 of the succeeding year—April 15, 2002, and ending on April 15, 2005, to make assessments. The assessments were made on February 14, 2005, a full two months before the April 15 cutoff and therefore they are not time-barred. Plaintiff's motion to dismiss must be denied.

The case holds that the 100% penalty against a responsible person must be made pursuant to 26 U.S.C. 6501(b)(2) within 3 years of the succeeding April 15 of the following year. Applied to the case, the assessment must be made by April 15, 1996 at the latest. In other words, the recovery of employment taxes against a person who willfully fails to cause a corporation to fail to pay employment taxes, must be assessed within three years. The factual failure by the Government in this case is an attempt to ignore that Western Management Inc., had two persons it

classified as employees. It timely filed forms 940 and 941 and timely paid employment taxes on these persons. The IRS also elected to proceed under 6672 to assess Robert E. Kovacevich. It elected its remedy and now cannot attempt to avoid 26 U.S.C. 6501(b)(2). Regardless of theory of recovery, the remedy is time-barred by filing of 941's evidence clearly possessed by the Government that is undeniable.

The Trial Court presumed that the period for assessment of tax was suspended against appellants while the alleged employer, Western Management litigated. Specific extensions were not executed by the Appellants. The assessment, in any event, cannot be collected after 10 years have elapsed. 26 U.S.C. § 6502. No personal agreement to extend the time for assessment were ever extended by agreement of Robert E. Kovacevich or Yvonne R. Kovacevich. The time for collection has expired.

## CONCLUSION

This Court should grant Motion to Dismiss the Amended Counterclaim. *Hinck v. United States*, 550 U.S. 501 (2001), denies Federal Court of Claims jurisdiction on tax collection.

DATED April 21, 2009.

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## APPENDIX G

**28 U.S.C. § 1291**. Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**28 U.S.C. § 1292.**

* * *

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title;

**28 U.S.C. § 1295.** Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

* * *

(3) of an appeal from a final decision of the United States Court of Federal Claims;

**28 U.S.C. § 1503.** Set-offs

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.

**26 U.S.C. § 6330**. Notice and opportunity for hearing before levy

(a) Requirement of notice before levy.—

(1) In general. No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(b) Right to fair hearing.

(1) In general. If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

* * *

(d) Proceeding after hearing.

(1) Judicial review of determination. The person may within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

**26 U.S.C. § 6404**. Abatements.

(g) Suspension of interest and certain penalties where secretary fails to contact taxpayer—

(1) Suspension.

(A) In general. In the case of an individual who files a return of tax imposed by subtitle A for a taxable year on or before the due date for the return (including extensions), if the Secretary does not provide a notice to the taxpayer specifically stating the taxpayer's liability and the basis for the liability before the close of the 36 month period beginning on the later of—

(i) the date on which the return is filed; or

(ii) the due date of the return without regard to extensions; the Secretary shall suspend the imposition of any interest, penalty, addition to tax, or additional amount with respect to any failure relating to the return which is computed by reference to the period of time the failure continues to exist and which is properly allocable to the suspension period.

**26 U.S.C. § 6672**. Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General rule.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

**26 U.S.C. § 6304**. Fair tax collection practices.

(b) Prohibition of harassment and abuse.

The Secretary may not engage in any conduct to the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any unpaid tax.

**26 U.S.C. § 7426**. Civil actions by persons other than taxpayers.

(a) Actions permitted.

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

(b) Adjudication.

The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction. If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.